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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-834,
5 Kansas versus Garcia.

6 General Schmidt.

7 ORAL ARGUMENT OF GEN. DEREK SCHMIDT

8 ON BEHALF OF THE PETITIONER

9 GENERAL SCHMIDT: Mr. Chief Justice,
10 and may it please the Court:

11 In a typical and recent year, more
12 than 15 million Americans became victims of
13 identity theft. One-third of those had their
14 personal information misused in an employment or
15 tax-related fraud setting.

16 Many of those victims were left to
17 untangle reputations, eligibilities, and other
18 finances. That is why Kansas, like every other
19 state, makes identity theft a crime. Our laws
20 apply in all settings to all people, citizen and
21 alien alike.

22 Respondents were convicted because
23 they stole other people's personal information
24 with intent to defraud. But, in Respondents'
25 view, these state criminal laws that govern

1 everybody else do not apply to them. They argue
2 that Congress has, in effect, granted them
3 special immunity because their intent was to
4 obtain employment that Congress has forbidden.

5 This Court never has so held and
6 should not now. The conflict fatal to the
7 Arizona employment statute is not present here,
8 because Kansas prohibits the theft of personal
9 information by anybody, not work by unauthorized
10 aliens. And this Court has identified no
11 preempted field relevant here.

12 Section 1324a(b)(5) means what it says
13 and no more. The I-9 verification system is
14 available only for specified federal uses.

15 (b)(5)'s use limitation, which is quite
16 different from typical preemption provisions, is
17 one of several safeguards Congress adopted in
18 1986 to limit both governments' and employers'
19 use of the then novel I-9 system.

20 But traditional state criminal law
21 still reaches misconduct elsewhere in the
22 employment context if proven without use of the
23 I-9 system. For example, states certainly still
24 may prosecute a felon who uses a stolen identity
25 to defeat a background check as a condition of

1 employment at a child care center, even if he
2 also used the same stolen identity on his Form
3 I-9. So too with the tax withholding forms used
4 here.

5 JUSTICE GINSBURG: But isn't it
6 telling, General Schmidt, that in all three
7 cases that we have, the prosecutor initially
8 charged false Social Security number on the I-9,
9 and it was only when the prosecutor appreciated
10 that that couldn't be done that the I-9 charge
11 was deleted?

12 GENERAL SCHMIDT: I think these cases
13 are here, Justice Ginsburg, because they do, of
14 course, present the issue of the intersection
15 between IRCA and generally applicable state law.
16 These cases all straddled, in their time lines,
17 this Court's decision in Arizona. And I think
18 that explains why the state originally attempted
19 to use the I-9, then understood this Court's
20 holding in Arizona, and withdrew from use of the
21 I-9.

22 I would point out, Your Honor, that
23 all three cases arose, were discovered, the
24 fraud was discovered, in a context outside the
25 employment setting. This is not what was

1 happening in subsequent cases in Arizona.

2 Mr. Garcia's fraud was discovered
3 first in a records check at a traffic stop;
4 Mr. Morales, from a separate investigation
5 related to workers' compensation; and
6 Mr. Ochoa-Lara, from a separate investigation --

7 CHIEF JUSTICE ROBERTS: Do you --

8 GENERAL SCHMIDT: -- of different
9 criminal conduct in the department.

10 CHIEF JUSTICE ROBERTS: -- do you
11 agree that the result would be different if the
12 information was harvested from the I-9s; in
13 other words, if state officials went to
14 employers, said let me see your I-9s, and then
15 that is used to gather information that's used
16 in the Kansas prosecutions?

17 GENERAL SCHMIDT: I think it likely
18 would, Your Honor. That is not what happened
19 here, and it's not supported on these records.
20 And I recognize that is a more difficult case.

21 We concede that the state may not use
22 the I-9 form. Whether that extends to a use
23 investigation, I think, is -- is perhaps a
24 somewhat different question, not presented here.
25 I recognize it's difficult, and we don't claim

1 that ground, but I don't want to concede it more
2 generally.

3 JUSTICE GINSBURG: But the package
4 that was submitted to the employer was all in
5 one package, the I-9, the withholding form,
6 federal and state. It's not that these were
7 discrete episodes.

8 It -- and -- and in all three cases,
9 the tax form, the I-9, the state tax form was
10 all for the same benefit, that was to gain
11 employment. You can't gain employment without
12 filling out those withholding forms.

13 GENERAL SCHMIDT: That's true, Justice
14 Ginsburg, and I think that speaks to the
15 important distinction that's at issue in this
16 case.

17 Our view of what Congress did in 1986
18 against the backdrop of this Court's decision in
19 DeCanas, that prior to IRCA the employment
20 process generally was available to -- was within
21 the scope of state criminal law.

22 In 1986, Congress created something
23 new and different. It created this I-9 system
24 which was a novelty at the time. With the force
25 of federal law, Congress was ordering millions

1 of private employers around the country to
2 gather up personal information of their
3 employees or potential employees and to hold
4 that information. So Congress was
5 understandably concerned about how employers and
6 others might use that information. That's why
7 they put the safeguards in.

8 The distinction, we believe, that's
9 been drawn is between the I-9 system itself,
10 which Congress created and placed off limits,
11 and the broader employment hiring context, which
12 states have traditionally been able to reach and
13 we believe still can reach.

14 And so, in the question that Your
15 Honor has posed, the fact that documents might
16 be submitted at the same time all for a purpose
17 of obtaining a job does not transform tax
18 withholding forms or any other hiring documents
19 like a resume, a job application, a background
20 check form, into part of the I-9 system.

21 JUSTICE SOTOMAYOR: May I --

22 GENERAL SCHMIDT: And that system is
23 what's permitted.

24 JUSTICE SOTOMAYOR: Can I unpackage
25 your argument a little bit? Is it your

1 position -- I seem -- you seem to be conceding
2 that you can't use the -- prosecute for any
3 false statements on the I-9 form, correct?

4 GENERAL SCHMIDT: Your Honor, as I've
5 said to the Chief Justice, we aren't doing that.
6 We concede -- we don't intend to do that. I
7 think --

8 JUSTICE SOTOMAYOR: All right.

9 GENERAL SCHMIDT: -- maybe for a
10 broader purpose, that's a different case.

11 JUSTICE SOTOMAYOR: So what meaning do
12 you give to the part of the preemption language
13 that says you can't use the form in any way?
14 The precise language is, I think -- I don't have
15 it.

16 GENERAL SCHMIDT: Is that the language
17 in (b)(5), Your Honor, where the --

18 JUSTICE SOTOMAYOR: Exactly.

19 GENERAL SCHMIDT: -- where Congress --

20 JUSTICE SOTOMAYOR: So, if you can't
21 use it in any way, why can you use the
22 information contained therein for employment
23 verification? Meaning I certainly do understand
24 an independent verification, like a criminal
25 check, criminal law check.

1 But you're still using it for
2 employment verification, correct?

3 GENERAL SCHMIDT: Well, I think not,
4 Your Honor. And -- and perhaps it's a
5 linguistic distinction, but I want to be clear
6 on what our point is.

7 JUSTICE SOTOMAYOR: Well, that's why
8 I'm having a problem, which is I'm not quite
9 sure how the -- how --

10 GENERAL SCHMIDT: We -- we --

11 JUSTICE SOTOMAYOR: -- you can concede
12 one without conceding the second.

13 GENERAL SCHMIDT: -- we think that
14 employment verification is -- is best used to
15 describe the I-9 system that Congress created in
16 the IRCA. In that subparagraph (b) of IRCA,
17 those first three paragraphs, Congress set up
18 the system of attestation and related
19 obligations. That is what verifies employment,
20 work authorization, for purposes of federal
21 immigration law.

22 There are other things in the
23 employment context that may be disqualifying for
24 obtaining a job, but those aren't, in our words,
25 employment verification that Congress has spoken

1 to.

2 JUSTICE SOTOMAYOR: All right.

3 JUSTICE GINSBURG: It's so --

4 JUSTICE SOTOMAYOR: I understand that
5 would --

6 JUSTICE GINSBURG: -- it would be so
7 easy to circumvent the I-9 then. All they have
8 to do is to switch to other forms submitted at
9 the same time.

10 GENERAL SCHMIDT: Well, Your Honor, I
11 -- I think I understand the point, and if I
12 understand it correctly, it is that information
13 that is false, stolen information from somebody
14 else that is contemporaneously submitted to an
15 employer, if it's not the same false information
16 on an I-9 and other employment-related
17 documents, it would necessarily reveal the fraud
18 on the I-9, if I'm understanding Your Honor's
19 question.

20 That may well be. But that doesn't
21 change the fact that what Congress has fenced
22 off here is the I-9 verification system, not the
23 tax withholding system, not other aspects of the
24 employment relationship.

25 And if Congress had wanted to more

1 broadly exclude states from that role, they knew
2 how to do it.

3 JUSTICE KAVANAUGH: But the two things
4 --

5 GENERAL SCHMIDT: They --

6 JUSTICE KAVANAUGH: Sorry. The two
7 things, as Justice Ginsburg points out, always
8 go together, the I-9 form and the tax forms. In
9 virtually all employment, you're going to be
10 asked for a Social Security number on both
11 forms. And so the states would, in essence, be
12 able to go after unauthorized employment in a
13 pretty substantial way, notwithstanding what
14 Congress said about giving the federal
15 government the role with employment
16 verification.

17 So how do you answer that concern,
18 and, in particular, I think Arizona's language
19 on unauthorized employment?

20 GENERAL SCHMIDT: And so, too, Justice
21 Kavanaugh, ride together background checks for
22 many, many jobs now, not just traditionally
23 highly sensitive, with teachers, for example,
24 and employment application forms that --

25 JUSTICE KAVANAUGH: Let's just focus

1 -- let's just focus on the I-9 and the tax forms
2 and Social Security numbers because that's --

3 GENERAL SCHMIDT: Right.

4 JUSTICE KAVANAUGH: -- what this is
5 about. And that's going to be what a lot of
6 these cases are about, I would think, if you
7 prevail here.

8 GENERAL SCHMIDT: Then I think,
9 Justice Kavanaugh, that the -- the best answer
10 to that is what Congress did not do. And if one
11 looks, for example, at 26 U.S.C. 7205, which is
12 a specific federal crime that makes fraud on a
13 W-4 form, I believe it's a federal misdemeanor,
14 Congress did not carve that out in the use
15 exception that it created in (b)(5).

16 It is nearly nonsensical to think that
17 Congress on the one hand would have created a
18 specific crime for W-4 fraud and yet precluded
19 its application in situations in which the W-4
20 is most commonly submitted, together with the
21 I-9.

22 It must be that Congress did not
23 consider the umbrella of immunity as to the I-9
24 to extend so far as to hit the W-4, and, of
25 course, Congress certainly didn't consider the

1 immunity it was granting with respect to the I-9
2 to the extent it did to extend to the state tax
3 withholding form, the K-4.

4 JUSTICE SOTOMAYOR: You couldn't --
5 you couldn't sue or prosecute a case for
6 someone's fraud on the W-4 and name the U.S. as
7 a victim, correct? The fraud is on the
8 government because W-4s are submitted to the
9 government for tax purposes, correct?

10 GENERAL SCHMIDT: I -- I think --

11 JUSTICE SOTOMAYOR: You don't have the
12 power as a state --

13 GENERAL SCHMIDT: I am -- I'm sorry,
14 Your Honor.

15 JUSTICE SOTOMAYOR: I don't believe
16 you have a power as a state to prosecute crimes
17 where the U.S. is a victim.

18 GENERAL SCHMIDT: I -- I -- I am -- I
19 am certain we don't do that, Your Honor.

20 JUSTICE SOTOMAYOR: I know you don't.

21 GENERAL SCHMIDT: What I'm struggling
22 with is --

23 JUSTICE SOTOMAYOR: It seems like
24 there would be a real separation of powers, too.

25 GENERAL SCHMIDT: Yeah. And I'm

1 certain we're not claiming that authority, Your
2 Honor. We're not trying to --

3 JUSTICE SOTOMAYOR: So why is it --

4 GENERAL SCHMIDT: -- vindicate the
5 interests of the United States.

6 JUSTICE SOTOMAYOR: -- permissible for
7 you to prosecute or to claim there isn't a field
8 preemption in doing exactly the same thing by
9 calling this a fraud under state law, because
10 the victim has to be the U.S.

11 GENERAL SCHMIDT: Well, I -- I'm --
12 I'm not sure the victim does have to be the
13 United States, Your Honor. I think the victims
14 here are the individuals whose identities were
15 stolen and misused.

16 JUSTICE SOTOMAYOR: Ah, that's stolen
17 Social Security, but that's different than the
18 fraud that -- of submitting the W-4 to the
19 government.

20 I have a -- I do have problems with
21 the K-4 for your other side to answer. But your
22 theory here on the K-4, I didn't see in the
23 trial record where you argued that clearly to
24 the three sets of juries.

25 GENERAL SCHMIDT: Your Honor, there

1 was -- Garcia was the only case that went to a
2 jury. The other two were bench trials. And the
3 K-4 was present, I believe, in two of the cases,
4 in Mr. Garcia's case and in Mr. Morales' case,
5 it was at least in the charging affidavits. I'd
6 have to look at the record more carefully to see
7 if it was -- if it carried through.

8 With respect to the field issue, Your
9 Honor, this Court has never identified a
10 preempted field in the employment context that
11 would be applicable here. And to the extent
12 that --

13 JUSTICE SOTOMAYOR: Well, Arizona.

14 GENERAL SCHMIDT: To -- well, I think
15 that Arizona, as we read it at least, Your
16 Honor, with respect to the employment provision,
17 the 5(c) provision in Arizona, that was a
18 conflict preemption analysis where Justice
19 Kennedy writing for the Court suggested that,
20 because of the method the state was using, the
21 criminal law, Congress in that application in
22 particular had declined to use the criminal law
23 to criminalize work by unauthorized aliens.

24 Here, that analysis isn't present at
25 all. Congress has criminalized fraud, as well

1 as identity theft. And so I think we're back in
2 the traditional world where we have separate
3 sovereigns who may go after the same conduct
4 unless it's precluded, and here it is not.

5 With respect to the field preemption
6 issue as well, I think it would be difficult for
7 this Court to recognize a preempted field now,
8 particularly in light of the provision of the
9 holding in Whiting, that was a conflict analysis
10 holding, but related to the E-Verify system.

11 It's difficult to imagine how there is
12 a preempted field states may not enter, even as
13 to employment verification narrowly, and yet, at
14 the same time, it was permissible for the State
15 of Arizona to order the use of the E-Verify
16 system to verify employment under federal law.

17 JUSTICE KAGAN: If I could go back to
18 Justice Kavanaugh's question, because you
19 recognize that you can't use the I-9s to
20 prosecute aliens in this way.

21 But you also acknowledge that the W-4s
22 are going to be present in every case in which
23 the I-9s will be present, which gives you the
24 ability to conduct all the prosecutions that you
25 could have done through the I-9s.

1 So what -- what effect then does --
2 does Congress's bar on states using the I-9s, in
3 fact, have?

4 GENERAL SCHMIDT: I -- I think,
5 Justice Kagan, back to my earlier point about
6 what Congress was doing in our view in 1986,
7 remember prior to 1986 there was no federally
8 mandated very disparate requirement for
9 collection of personal information throughout
10 the country by employers.

11 And Congress was very concerned about
12 what now seems commonplace but at the time was
13 novel. They were concerned about how that
14 information might be misused.

15 And we think that explains the -- the
16 Congress's choice of the language in (b)(5).
17 They didn't use traditional preemption language
18 as they did in (h)(2) as to employers. If they
19 wanted to exclude states from this area
20 entirely, they could have done it, they did it
21 in this statute, as to employers in (h)(2).

22 JUSTICE KAVANAUGH: But I think --

23 GENERAL SCHMIDT: But they used
24 different language in (b)(5), a more passive
25 voice. They didn't talk about states

1 specifically at all or governments specifically
2 at all. They simply said that neither the form,
3 nor information on it, nor anything -- the
4 attachments to it, appended to it, may be used.

5 And I think they were principally
6 worried about how employers might misuse it. Of
7 course, I'm not suggesting they were inviting
8 us. I'm just suggesting that was their focus
9 and why they wrote the provision the way they
10 did.

11 JUSTICE KAGAN: But let me -- let me
12 ask the same question, maybe from a different
13 perspective, which is our decision in Arizona,
14 because our decision in Arizona said that states
15 could, in fact, not prosecute unauthorized
16 employees for seeking employment.

17 And -- but this gives you a tool to do
18 just that in every single case. So essentially
19 it eviscerates everything that we said in
20 Arizona, doesn't it?

21 GENERAL SCHMIDT: Well, Your Honor, as
22 I suggested earlier, the way we read the
23 reasoning in Arizona is not applicable here. So
24 we think it is distinguished and -- and -- and
25 separate.

1 If this Court were to, in our view at
2 least, extend Arizona to cover this
3 circumstance, you know, we think that would be a
4 very different type of case than we have.

5 JUSTICE KAGAN: Well, you're talking
6 about extending Arizona, but I'm suggesting that
7 if you are right on this case, we -- we might as
8 well not have issued Arizona.

9 GENERAL SCHMIDT: No, I think not,
10 Your Honor, because, again, what the state is
11 focused on here, and I don't think this is
12 seriously disputed -- mildly, perhaps, in the
13 record -- is vindicating its traditional
14 interest in prosecuting fraud.

15 The fact that incidentally our
16 generally applicable laws intersect with the
17 employment context or perhaps the immigration
18 context does not mean that Congress has
19 commanded, nor should we carve out, special
20 application or lack of application of our
21 general laws to persons because of their work
22 authorization status.

23 In other words, Arizona is a very
24 different circumstance. We aren't targeting
25 folks because of their status. We are enforcing

1 our employment, our -- our identity theft laws,
2 and we don't want to give special exception to
3 that to people because of their status.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Michel.

7 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL
8 FOR THE UNITED STATES, AS AMICUS
9 CURIAE, SUPPORTING THE PETITIONER

10 MR. MICHEL: Mr. Chief Justice, and
11 may it please the Court:

12 Respondents stole the identity
13 information of others and passed it off as their
14 own on tax withholding forms. There's no
15 dispute that states could traditionally
16 prosecute frauds and forgeries of that kind.

17 The question is whether Congress
18 withdrew that authority when it passed IRCA in
19 1986. Congress did not. IRCA is an immigration
20 statute. It set up a new system -- that's the
21 employment verification system -- precisely to
22 verify whether employees have work authorization
23 as a matter of federal immigration law.

24 Now IRCA put express limits on the use
25 of the form that employees submit to document

1 their work authorization. And as the Court held
2 in Arizona, IRCA also put implied limits on what
3 court -- on what states can do to regulate work
4 authorization.

5 But nothing in IRCA diminished the
6 states' long-standing power to prosecute crimes
7 like this one, non-immigration offenses on
8 non-immigration forms submitted for
9 non-immigration purposes.

10 And a statute designed -- as a statute
11 designed to -- to prevent unauthorized work,
12 IRCA certainly did not create unique immunities
13 for unauthorized workers.

14 JUSTICE GINSBURG: Does this represent
15 a change in the government's position? I
16 thought the government's prior position was that
17 on documents that the employee or the
18 prospective employee is filing at the same time
19 as the I-9, there would be preemption?

20 MR. MICHEL: No, Justice Ginsburg. I
21 think you're referring to the brief the
22 government filed in the Ninth Circuit in the
23 Puente Arizona case. And in that brief, we took
24 two positions that I think are relevant here.

25 First, we took a position that's

1 exactly the one we take here with respect to
2 (b)(5), which is that that provision doesn't bar
3 prosecution using forms other than the I-9.
4 That's the express preemption argument.

5 As to implied preemption, the
6 government said in that brief that fraud on the
7 work authorization process would be impliedly
8 preempted, but the government at page 23 of that
9 brief expressly said that fraud outside the work
10 authorization process -- for example, on -- on
11 tax withholding forms that we have here -- would
12 not be preempted any more than state laws that
13 regulate drugs or robbery or other regular
14 crimes like this.

15 JUSTICE BREYER: Could you do this?
16 Could a state have a law which says it is a
17 crime for an alien to take information from the
18 S form or other information that they give
19 that's referred to in the federal statute, and
20 it is a crime to do that and fraudulently give
21 it to an employer for the purpose of obtaining a
22 job?

23 MR. MICHEL: I think that that might
24 be preempted under the --

25 JUSTICE BREYER: Ah. That -- well, is

1 it or isn't it?

2 MR. MICHEL: Well, that --

3 JUSTICE BREYER: In your opinion? I'm
4 not holding you to it forever. I just want to
5 know.

6 (Laughter.)

7 MR. MICHEL: I -- I think, of course,
8 that is -- it's far removed from this case
9 where --

10 JUSTICE BREYER: Well, I'm not saying
11 that yet.

12 MR. MICHEL: Yeah.

13 JUSTICE BREYER: I want to know if
14 they could do that; in other words -- shall I
15 repeat it? You -- you know what I said.

16 MR. MICHEL: Well, our -- our
17 position, as we laid out in the Puente brief, is
18 that a law that regulates fraud on the work
19 authorization process, which I think is what
20 your hypothetical was, although I'm not sure
21 I've tracked every piece of it.

22 JUSTICE BREYER: What it does is it
23 says that if you take information from the S --
24 is it S-9? Is that what it's called?

25 MR. MICHEL: The I-9.

1 JUSTICE BREYER: I-9 or these other
2 papers that are referred to, and you, Mr. Alien,
3 go and give it to an employer for the purpose of
4 pretending that you're somebody you aren't so
5 you'll get a job, would that be preempted?

6 MR. MICHEL: Yeah, I do think that
7 would be preempted --

8 JUSTICE BREYER: So do I.

9 MR. MICHEL: -- under our case.

10 JUSTICE BREYER: Now, if that's so, I
11 just wonder how this differs, because it defines
12 the state law as applied in this case, though
13 it's much broader, but as this case as it was
14 put in the arguments by the prosecutors and by
15 the complaints and so forth, what he did was,
16 what was charged was using identifying
17 information or documents which are the same
18 information as on the I-9, using it to defraud
19 another person, which they did, I guess, in
20 order to receive a benefit, which benefit was a
21 job. So they took information from the I-9,
22 used it to defraud an employer in order to get a
23 job.

24 Now, if there is a difference between
25 what I just said and what I'd said when I was

1 asking you the question, I'm not sure what it
2 is.

3 MR. MICHEL: Maybe I can help you out.

4 JUSTICE BREYER: Yes.

5 MR. MICHEL: I think it's the
6 distinction -- and this is a critical one --
7 between work authorization, which is a defined
8 -- which is a term of art under immigration law,
9 in IRCA, and general requirements for obtaining
10 a job, such as submitting a tax withholding
11 form, submitting a background check. Those are
12 two quite different things.

13 IRCA is an immigration -- as I said at
14 the outset, an immigration statute that deals
15 with work authorization to work in the United
16 States. There are other requirements of law.
17 For example, 26 U.S.C. 3402 requires a tax
18 withholding form. But that has nothing to do
19 with work authorization. Regardless of your
20 work authorization status, you still have to
21 submit a tax withholding form.

22 And I think one way to illustrate the
23 distinction is that a U.S. citizen, who has
24 undoubted work authorization, could submit the
25 same materials that were submitted here, a false

1 Social Security -- a stolen Social Security
2 number on the I-9 and the tax withholding form,
3 for example, to conceal a criminal conviction or
4 sex offender status.

5 JUSTICE BREYER: All that's true, but
6 the allegation in the criminal cases here, I
7 think, were that the people, the defendants,
8 were aliens and that, moreover, they submitted
9 the information from the I-9 form -- it didn't
10 say I-9 form, but it was from the I-9 form --
11 and they submitted it to get a job. It said
12 nothing about they submitted it to get a job
13 because it showed we paid taxes.

14 And I suspect they submitted it to get
15 the job because the employer would think they
16 were a different person.

17 MR. MICHEL: So, Your Honor, I
18 think --

19 JUSTICE BREYER: Where am I wrong on
20 that?

21 MR. MICHEL: So I -- I think, at -- at
22 a minimum, they submitted it for two different
23 reasons. One, perhaps to demonstrate work
24 authorization, which it couldn't be clearer that
25 Arizona is not prosecuting here -- I mean,

1 excuse me, that Kansas is not prosecuting here
2 because it dismissed the counts on the I-9.

3 They also submitted it, and there is
4 testimony in the record about this, that the
5 employers would not have given them the jobs but
6 for their submission of the tax forms.

7 JUSTICE BREYER: Well, then why isn't
8 it --

9 MR. MICHEL: And that's --

10 JUSTICE ALITO: May I ask you a
11 question about -- before your time expires,
12 about the meaning of the language in (b)(5), any
13 information contained in the I-9. What does
14 that mean?

15 MR. MICHEL: I think that simply means
16 -- that simply covers everything that's on the
17 I-9 form. And that's an effort by Congress to
18 cover broadly everything that's on the form, in
19 case there were some creative prosecutor who
20 wanted to say, well, we've extracted piece of
21 the -- a piece of the I-9 and, therefore, we're
22 not using the I-9 in violation of (b)(5).

23 And even if this Court might not find
24 that a very persuasive argument, I think it
25 makes sense that Congress wanted to be doubly

1 sure that they were covering the full form.

2 JUSTICE ALITO: I still don't
3 understand what you make of it and how it fits
4 the language of the statute. Information means
5 generally a fact, all right? So facts contained
6 in the I-9 would be the name, the Social
7 Security number, the address, all the facts that
8 the applicant for employment puts on the I-9.

9 Now I agree that that -- it can't mean
10 that. That -- that produces ridiculous results.
11 It can't mean that those facts can never be used
12 by anybody for any purpose. But I -- I don't
13 quite see how -- I don't really understand --
14 your -- you mean -- you interpret this to mean
15 they can't use the I-9 in -- in whole or they
16 can't use the I-9 in part. Isn't that -- that's
17 what it comes down to.

18 How does that fit the language of the
19 statute?

20 MR. MICHEL: Oh, I think if you look
21 at the full phrase, Justice Alito, which is "use
22 the I-9 or any information contained in the
23 I-9," it -- I think it simply means that they
24 can't use either the I-9 in whole or the
25 information that appears on the I-9, which, you

1 know, if you look at the I-9, which is in -- in
2 our appendix, it has the Social Security number
3 and other information like that.

4 JUSTICE SOTOMAYOR: But you forget the
5 rest of it, which says for purposes only related
6 to the fraud sections of the -- the federal
7 code. So it does seem to me to be limiting the
8 use for fraud related to employment verification
9 --

10 MR. MICHEL: Yes.

11 JUSTICE SOTOMAYOR: -- to seeking a
12 job.

13 MR. MICHEL: That last point, I think,
14 is the critical one. Work authorization under
15 immigration law is not the same thing as seeking
16 a job in general. And to go back to the point I
17 was making to Justice Breyer, if you allowed
18 prosecution of that U.S. citizen -- I mean if
19 you allowed preemption of the prosecution of a
20 U.S. citizen who committed -- who gave exactly
21 the same forms here, you would be letting
22 immigration -- you would be --

23 JUSTICE SOTOMAYOR: But why? The
24 whole focus --

25 MR. MICHEL: -- letting preemption

1 flow from --

2 JUSTICE BREYER: I didn't do that. I
3 would just say, if this statute is used by a
4 state to prosecute, roughly, the very thing that
5 the federal statute reserves to the federal
6 government, they can't. And so the question is,
7 is it the very thing?

8 MR. MICHEL: And --

9 JUSTICE BREYER: And then my -- my
10 question has been trying to figure out why isn't
11 the very thing? Because it certainly sounds
12 like the very thing.

13 MR. MICHEL: I agree that the term
14 sounds similar, but I do think it would be a
15 mistake to -- to be confused by that because
16 work authorization is very different than --

17 JUSTICE KAGAN: Well, Mr. Michel --

18 MR. MICHEL: -- getting a job.

19 JUSTICE KAGAN: -- let me put the same
20 sort of question in another way, because when
21 you were speaking with Justice Breyer, you said
22 that a state law that regulates fraud in the
23 work authorization process would be preempted.
24 And I guess the question here is Kansas has a
25 generally applicable law, but even generally

1 applicable laws can be used to regulate fraud in
2 the work authorization process, and when a
3 statute, even though generally applicable, is
4 used in that way, shouldn't the same results
5 follow?

6 MR. MICHEL: May I answer, Mr. Chief
7 Justice?

8 CHIEF JUSTICE ROBERTS: Yes.

9 MR. MICHEL: Yes. The answer is yes.
10 And that, I think, was manifested in this case
11 by Kansas dismissing the I-9 charges. Those
12 were the charges that related to work
13 authorization, which is the purpose of IRCA.

14 These other charges that related --
15 that related to matters not related to work
16 authorization were not preempted by IRCA, which
17 is, after all, an immigration statute, and,
18 therefore, were properly not preempted.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Hughes.

22 ORAL ARGUMENT OF PAUL HUGHES

23 ON BEHALF OF THE RESPONDENT

24 MR. HUGHES: Mr. Chief Justice, and
25 may it please the Court:

1 I'd like to begin with the rule that
2 we asked the Court to adopt: States may not
3 prosecute individuals for using false
4 information to demonstrate work authorization
5 under federal immigration law.

6 To put this slightly differently, if
7 to satisfy an element of a state offense the
8 state proves that an individual used false
9 information to show federal work authorization,
10 IRCA preempts the prosecution.

11 If this element is not present, there
12 is no IRCA preemption.

13 JUSTICE SOTOMAYOR: Even if they were
14 applying to a college? Meaning --

15 CHIEF JUSTICE ROBERTS: I'm sorry.
16 You can answer that question after your time
17 has --

18 JUSTICE SOTOMAYOR: I'm sorry.

19 MR. HUGHES: Thank you, Your Honor.

20 IRCA requires preemption here because
21 Kansas prosecuted Respondents for using false
22 information to demonstrate federal work
23 authorization.

24 Kansas chose to prosecute fraud
25 claims. One element it had to prove was that

1 Respondents used deceit to obtain property.
2 Kansas had one theory. Respondents used false
3 information to show employment eligibility and,
4 thus, they obtained jobs.

5 Had Respondents used truthful
6 information, Kansas maintains, they would not
7 have been hired because of federal immigration
8 law.

9 In the intermediate state court,
10 Respondents argue that the state had
11 insufficient evidence to prove the benefit
12 element. Adopting the state's argument, the
13 Court held that Kansas satisfied the
14 requirements of state law by proving that
15 Respondents wrongfully showed that they were
16 eligible for employment.

17 Now, according to the Kansas Supreme
18 Court, "the state seeks to punish an alien who
19 used the personal identifying information of
20 another to establish the alien's work
21 authorization."

22 Indeed, Kansas initially charged
23 Respondents with fraud on the I-9. While it
24 dropped those charges, its theory of the
25 prosecution remained exactly the same. For

1 purposes of preemption, the label a state
2 attaches to its regulation is not relevant.
3 What matters is what the state actually
4 regulates.

5 So, here, Kansas is prosecuting the
6 use of false information to show work
7 authorization under federal immigration laws.
8 Kansas has charged two state offenses, both of
9 which include the element of an intent to
10 defraud.

11 CHIEF JUSTICE ROBERTS: If -- if the
12 -- the I-9 process, the -- the individual
13 applying for authorization uses a false Social
14 Security number, can that number ever be used to
15 prosecute him for identity theft?

16 MR. HUGHES: Yes, it can, Your Honor.
17 Our theory of preemption is a limited one. In
18 our view, what federal law preempts is a
19 prosecution for the use of false information
20 with respect to showing that somebody is
21 authorized under the federal immigration laws
22 for employment. That is the element that
23 federal law preempts.

24 If a prosecution --

25 CHIEF JUSTICE ROBERTS: I'm sorry,

1 just -- so the Social Security number is used in
2 the I-9 process to establish work authorization?

3 MR. HUGHES: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: And the state
5 can use that number so long as it's not being
6 used to show work authorization?

7 MR. HUGHES: That's right, Your Honor.
8 If a state offense has unrelated to work
9 authorization, our theory of preemption does not
10 apply. In our view --

11 CHIEF JUSTICE ROBERTS: Including --
12 including to get a job, right? In other words,
13 work authorization and applying to get a job
14 are, as Mr. Michel told us, two different
15 things?

16 MR. HUGHES: I think that's
17 inaccurate, Your Honor, because the way the
18 state prosecuted here was absolutely tethered to
19 federal work authorization. And there are a few
20 different ways that we know this is true.

21 First, if the Court looks to the --
22 the brief that the state submitted --

23 CHIEF JUSTICE ROBERTS: I don't mean
24 to -- just so I make sure where your head --
25 that we're on the same page, so you would say

1 that the Social Security number, even though
2 it's information contained on the I-9 in the
3 process, can be used, say, to get a driver's
4 license but not to get a K-4?

5 MR. HUGHES: Well, I -- I think that's
6 right, Your Honor. So, if this is tied to
7 federal work authorization, that is where
8 preemption occurs. And we know that that is the
9 theory of prosecution in these cases.

10 JUSTICE KAVANAUGH: How are you
11 defining work authorization, just so I'm clear
12 on the answer to the Chief Justice's question?

13 MR. HUGHES: Yes, Your Honor. This is
14 incorporated from federal law. So the question
15 is, is an element of the offense that an
16 individual was showing as a matter of federal
17 law that they were authorized for employment.

18 If that is the nature of the fraud,
19 then that is something that solely the federal
20 government is authorized to prosecute.

21 If it's not that theory, our theory of
22 preemption does not apply in those
23 circumstances.

24 JUSTICE SOTOMAYOR: Mr. Hughes, give
25 us some examples. That was my earlier question.

1 MR. HUGHES: Examples --

2 JUSTICE SOTOMAYOR: Let's assume --
3 you mentioned getting a driver's license or
4 getting into a college or getting a credit card.
5 Let's assume that false information was used for
6 any of those processes.

7 MR. HUGHES: Our theory of preemption
8 does not apply to any of those, Your Honor.

9 JUSTICE SOTOMAYOR: All right. But
10 let's assume that the question the college asks
11 is simply are you authorized to work in the
12 United States.

13 MR. HUGHES: If the element is are you
14 authorized as a matter of federal immigration
15 law to work in the United States, and somebody
16 commits fraud in answering that question, that
17 is what federal law preempts.

18 And so our theory of preemption is a
19 straightforward one that we think is easily
20 applied, which is just the question of is this
21 an element that is necessary to the state
22 offense.

23 If it is, there's preemption. If it's
24 not, there's no preemption.

25 JUSTICE GINSBURG: How about --

1 CHIEF JUSTICE ROBERTS: So --

2 JUSTICE GINSBURG: -- how about a -- a
3 form that you file so that your employer will
4 directly deposit your pay into your bank
5 account?

6 MR. HUGHES: So, Your Honor, if there
7 is -- the element that I just described is not
8 present, we don't think there's preemption. And
9 -- and let me say --

10 JUSTICE GINSBURG: But the -- the --
11 the specific question, the form is submitted so
12 that your pay will go directly into your bank
13 account. Is that preempted or not?

14 MR. HUGHES: Well, Your Honor, and --
15 and, again, to answer the hypothetical, I have
16 to know if the prosecution includes an element
17 of -- of -- of what the -- what the fraud is,
18 because, in that theory, Your Honor, it's not
19 clear why the use of a false Social Security
20 number would be relevant, or would be a material
21 aspect, but -- but, if it is, that prosecution
22 could proceed. So --

23 JUSTICE ALITO: States -- states may
24 impose requirements for particular jobs or maybe
25 even for all jobs, but let's just stick to

1 particular jobs that go beyond the requirements
2 necessary for obtaining any employment in the
3 United States, such as information for a
4 criminal background check or to prove age that's
5 a requirement for the job, using dangerous
6 machinery.

7 Does your argument apply to that?

8 MR. HUGHES: No, Your Honor. If the
9 state has those sorts of requirements that are
10 unrelated to the federal immigration laws, and
11 they -- there's a valid state law that requires
12 information at the time of hiring for those
13 reasons, our argument does not apply and
14 preemption does not --

15 JUSTICE GORSUCH: Counsel --

16 JUSTICE ALITO: So, if the K-4 serves
17 a purpose other than policing compliment with
18 the federal requirement for obtaining work, then
19 that would be sufficient?

20 MR. HUGHES: Well, I think -- and let
21 me be quite clear about this, Your Honor -- I
22 think if the state had charged this as simply
23 the Kansas misdemeanor offense, which is making
24 a false statement on a state tax form, I think
25 we would have a very different case in that

1 circumstance.

2 JUSTICE ALITO: Why does it matter?

3 MR. HUGHES: Because the -- the
4 distinction, Your Honor, is because when the
5 state prosecutes using -- and the theory is
6 false information to show federal employment
7 authorization, that is an immigration offense.
8 That's an immigration offense that's defined by
9 IRCA, the Immigration Reform and Control Act.
10 That's an immigration offense that is -- is
11 regulated by the federal immigration --

12 JUSTICE KAVANAUGH: So if a state --

13 JUSTICE KAGAN: So, to make all these
14 distinctions that you're talking about, you look
15 to the elements of the state law or you look to
16 the underlying conduct or you look to both? How
17 does it work?

18 MR. HUGHES: Your Honor, I think you
19 look to the elements and then you understand, as
20 applied in that context, what is the theory that
21 the state is offering to prove the elements of
22 that offense? So --

23 JUSTICE GORSUCH: Well, on the
24 elements of this offense, it's just, as I
25 understand it, using someone else's identity.

1 Right?

2 MR. HUGHES: It's to receive a
3 benefit, Your Honor. And it's that receipt of
4 the benefit that is the necessary element.

5 JUSTICE GORSUCH: Okay. The receipt
6 of the benefit could be a completed form that's
7 required by the state for other purposes besides
8 immigration law.

9 MR. HUGHES: Your Honor, if the state
10 were --

11 JUSTICE GORSUCH: Because you concede
12 the form could be used for other purposes,
13 right?

14 MR. HUGHES: Your Honor, if a state --

15 JUSTICE GORSUCH: But we agree the
16 state form can be used for other purposes
17 besides compliance with the immigration laws,
18 right?

19 MR. HUGHES: Yes, I think I agree with
20 you, Your Honor, yes.

21 JUSTICE GORSUCH: Okay. All right. I
22 think we have to, right? I mean, states are
23 allowed to enforce their tax laws, right?

24 MR. HUGHES: Yes, of course, of
25 course.

1 JUSTICE GORSUCH: Okay. So a false
2 statement on that form could be for other
3 purposes, and it's not essential to the crime of
4 -- of identity theft, is it?

5 MR. HUGHES: That's right, Your Honor.
6 And our point, though, is the state, if the
7 state had wanted to charge this as a state tax
8 offense, of saying we have these state tax
9 forms, you've put inaccurate information on --

10 JUSTICE GORSUCH: No, no, but even
11 identity theft, would -- would you concede then
12 that a state could have an identity theft case
13 based on this same form?

14 MR. HUGHES: Your Honor, I think the
15 question is what their theory of benefit is,
16 what is the intent to defraud --

17 JUSTICE GORSUCH: So it's not about
18 the elements. It's about the theory, the facts
19 and their intentions.

20 MR. HUGHES: Well -- well, Your Honor,
21 there is a -- an element of the -- the offense,
22 the intent to defraud, and then the state
23 applying that to the individual circumstance has
24 to show what the intent to defraud in that
25 particular case is.

1 JUSTICE KAVANAUGH: If a -- I'm
2 sorry -- if a -- if a state passes a law making
3 it a serious felony to use a false Social
4 Security number on a state tax form, is that
5 state law preempted?

6 MR. HUGHES: I -- I don't think so
7 under our theory, no, Your Honor.

8 JUSTICE KAVANAUGH: Well, how is that
9 different than --

10 MR. HUGHES: Because that's not what
11 Kansas has done here. What Kansas has done here
12 --

13 JUSTICE KAVANAUGH: And why exactly is
14 it different from what Kansas has done here and
15 how does that fit with your implied preemption
16 theory of enforcement discretion, which I
17 thought was tied to the use of the false Social
18 Security number?

19 MR. HUGHES: Your Honor, what Kansas
20 has done here is it is on its face objectively
21 prosecuting an immigration offense, because it
22 has said repeatedly in the lower courts that
23 necessary to show it's -- the intent to deceive
24 element, was showing that individuals used false
25 information to show that they were eligible

1 under federal law to hold employment when they
2 were, in fact, not.

3 JUSTICE ALITO: What type of --

4 JUSTICE KAGAN: Well, Mr. Hughes, it
5 just seems a -- a -- a little bit odd to look
6 to, you know, particular statements that Kansas
7 made in order to determine whether a particular
8 prosecution is preempted.

9 So that's why I asked the question
10 that I asked. It's like how as a general matter
11 do you go about determining whether a
12 prosecution is preempted?

13 MR. HUGHES: Well, Your Honor, I think
14 it's the same analysis the Court used in a case
15 like Buckman, for example, and Buckman is
16 looking at general state fraud laws and said,
17 well, this is fraud on the FDA. How do we know
18 if this is within the range of things that are
19 preempted?

20 And one of the tests that Buckman
21 used, I think, is directly relevant here, is
22 Buckman said state laws in that context were not
23 simply parallel to federal laws, but, in fact,
24 the state offense was derivative of the federal
25 offense because one of the critical requirements

1 to show the state law fraud was showing that
2 there was an underlying violation of the FDA's
3 own regulations --

4 JUSTICE GORSUCH: So, Mr. Hughes --

5 MR. HUGHES: -- that led to that
6 fraud.

7 JUSTICE GORSUCH: -- just to follow up
8 on -- on Justice Kagan's question, if the -- if
9 Kansas's theory of the benefit in this case were
10 that by filing a W-4, the defendant had an
11 intention to comply with Kansas tax law, would
12 that be un-preempted in your -- in your theory?

13 MR. HUGHES: Your Honor, if there --

14 JUSTICE GORSUCH: I think -- I think
15 that would be safe, right?

16 MR. HUGHES: I think that might be,
17 Your Honor. I think, though --

18 JUSTICE GORSUCH: Okay. So --

19 MR. HUGHES: -- that the state might
20 have a difficult --

21 JUSTICE GORSUCH: -- so we really are
22 down to drawing distinctions on preemption here
23 based on Kansas's particular intentions in a
24 particular case.

25 MR. HUGHES: Well, it's the nature of

1 how they're applying the intent-to-defraud
2 element in that context. We certainly don't
3 think that all of Kansas's ID fraud laws are --
4 are preempted, nor are all ID fraud offenses
5 with respect to Social Security numbers.

6 JUSTICE KAGAN: But, again,
7 Mr. Hughes, the idea of it's -- it's because of
8 how they're applying their law, how do we know
9 how they're applying their law at the outset,
10 right? We want to make these decisions at the
11 outset. Can this prosecution go forward or can
12 it not? How do we know how they're applying
13 their law in this particular case?

14 MR. HUGHES: I think, as a practical
15 matter, Your Honor, what would happen in a case
16 like this is, if the state charges somebody with
17 this issue that is around a hiring offense,
18 saying that there's identity theft, the
19 defendant under the rule that we permit -- or we
20 -- we advance would be entitled to file a motion
21 to dismiss that charge, saying this charge is
22 preempted by federal law, and the state would
23 then have an opportunity to say no, that is not
24 the theory of -- of prosecution that we advance
25 in this particular case.

1 JUSTICE SOTOMAYOR: Mr. Hughes, can I
2 ask you to bring your answer to a more practical
3 answer, which is how would you think -- give me
4 a hypothetical or even this -- why this case
5 differs from the case you think is not
6 preempted?

7 MR. HUGHES: This --

8 JUSTICE SOTOMAYOR: By that, I mean
9 what do you see in the -- what are the words in
10 the charge here that are different than the
11 words that you think are not preempted?

12 MR. HUGHES: So I think looking just
13 to the charge itself can be difficult, Your
14 Honor, because the state charges often are --

15 JUSTICE SOTOMAYOR: That's why the
16 Kansas court went to the -- to --

17 MR. HUGHES: Right. But -- but, Your
18 Honor, I think --

19 JUSTICE SOTOMAYOR: -- to the as
20 applied challenge.

21 MR. HUGHES: However, the state
22 appellate court said that this goes directly to
23 employment eligibility, and this is exactly how
24 when the -- the Respondents challenge saying
25 you've not provided us sufficient evidence to

1 show the benefit element, the state was
2 obligated to say here's the evidence that we
3 have shown that satisfies the benefit element.

4 What was the evidence they provided?
5 It was exclusively eligibility for employment
6 that's tethered to federal --

7 JUSTICE GORSUCH: So Kansas --

8 MR. HUGHES: -- immigration law.

9 JUSTICE GORSUCH: -- will never make
10 that mistake again, Mr. Hughes.

11 MR. HUGHES: Your Honor, there --

12 JUSTICE GORSUCH: And in every future
13 case, they will say the benefit that the
14 defendant is seeking is the opportunity to
15 comply with our tax laws and our -- our revenue
16 laws. And -- and -- and that will be the end of
17 that.

18 So we are -- we are deciding how many
19 angels are dancing on the head of this pin? Is
20 that what -- is that what this case is about?

21 MR. HUGHES: I disagree with that for
22 a few reasons, Your Honor. First, they still
23 have to convince a jury that there is, in fact,
24 a benefit, and I think there might be some --

25 JUSTICE GORSUCH: Sure. No, of

1 course, they have to. Of course, they have to.
2 But it's not preempted, and none of these cases
3 will ever be preempted again after today.

4 MR. HUGHES: Well, a few things about
5 that, Your Honor. First, there are other ways
6 to comply with the K-4 without using somebody
7 else's Social Security number, including, for
8 example, using an I-10, an individual taxpayer
9 identification number. So that is a way that
10 that might happen.

11 JUSTICE GORSUCH: But every time an
12 employee uses a false identification number in
13 these cases, Kansas will use a different set of
14 magical words, and that will be the end of this
15 problem?

16 MR. HUGHES: But, Your Honor, what the
17 distinction is, is while Kansas may prosecute a
18 wide range of -- of offenses on its tax system,
19 and we certainly don't disagree with that, what
20 Kansas might not do is have its own individual
21 immigration policy and immigration offenses.

22 I think I agree with you there are
23 ways that Kansas can charge similar sorts of
24 conduct when it relates to the tax system that
25 is not a state adopting its own immigration

1 system. And I think --

2 JUSTICE ALITO: What type of --

3 MR. HUGHES: I was going to say just
4 -- just to conclude with that point, Your Honor,
5 I think to the extent that this is, as you
6 suggest, angels dancing on a pin, I think that
7 suggests the opposite conclusion, precisely as
8 to why preemption is warranted here because of
9 how Kansas charged this case.

10 And if that is where -- where the
11 Court agrees, then there shouldn't be any
12 concerns about --

13 JUSTICE GORSUCH: Then why shouldn't
14 we DIG this case? I mean, if this is about a
15 one-off prosecution that has no chance of
16 recurring ever again and, you know -- I mean, I
17 know you're vigorously defending your client,
18 but we don't usually take cases that have such
19 limited application.

20 MR. HUGHES: We would perfectly
21 welcome a DIG, Your Honor. I think that would
22 be an appropriate outcome in this case.

23 (Laughter.)

24 JUSTICE ALITO: What type of -- what
25 type of --

1 JUSTICE GORSUCH: Touche.

2 JUSTICE ALITO: -- preemption are you
3 relying on? What type of preemption are you
4 relying on?

5 MR. HUGHES: Your Honor, we argue both
6 express preemption on the language of
7 1324a(b)(5) as well as conflict with -- or,
8 sorry, with -- as well as implied, with respect
9 to implied --

10 JUSTICE ALITO: I don't see how you
11 get express preemption out of (b)(5). And I
12 don't know what the conflict is. What is the
13 conflict?

14 MR. HUGHES: The conflict is the
15 similar sorts of conflicts that the Court
16 recognized with respect to Section 3 of SB 1070.

17 JUSTICE ALITO: But what -- what is
18 the conflict?

19 MR. HUGHES: The conflict is the
20 exercise of prosecutorial discretion, how the
21 federal government uses prosecutorial discretion
22 to establish a consistent --

23 JUSTICE ALITO: Well, how do we know
24 --

25 MR. HUGHES: -- federal immigration --

1 JUSTICE ALITO: -- that the federal
2 government has taken the position that this
3 particular case or cases of this particular type
4 shouldn't be prosecuted? This is not a
5 situation like Arizona, where a state has
6 criminalized something that is not criminal
7 under federal law.

8 It's a case where the same conduct is
9 criminal under federal law and, Kansas says,
10 under Kansas law. So where's the conflict?

11 MR. HUGHES: Your Honor, that was
12 exactly the case with respect to Section 3 of SB
13 1070, where the state had adopted precisely the
14 federal standards in assessing what was the
15 underlying state offense, and they still found
16 preemption.

17 JUSTICE ALITO: What is the conflict?
18 The federal government doesn't say this is
19 contrary to our -- our enforcement priorities.

20 MR. HUGHES: The conflict is states
21 having independent immigration policies that
22 differ from how the federal government has
23 established the priorities with respect to both
24 which tools to use for enforcement, as well as
25 which -- who to, in fact, prosecute.

1 JUSTICE KAVANAUGH: But you conceded
2 that a state could pass a law making it a felony
3 to use a false Social Security number on a state
4 tax form.

5 MR. HUGHES: Your Honor, and that
6 would not be an immigration offense, and that
7 would not be a state having its own individual
8 immigration policy.

9 JUSTICE KAVANAUGH: But that would be
10 -- but that would certainly be a way for a state
11 to target people who are non-citizens who are
12 unlawfully in the country from obtaining
13 employment by enacting such a law. So I guess,
14 following up on Justice Alito's question, I'm
15 not sure if that's not a conflict, why there's a
16 conflict here?

17 MR. HUGHES: Your Honor, if there is
18 an underlying targeting that is the intent
19 behind that law, I think that that might be
20 susceptible to other challenges, not the ones we
21 bring here, but related to either constitutional
22 claims or selective enforcement or other kinds
23 of challenges to that.

24 That is, by no stretch, the argument,
25 though, that we press in this case.

1 JUSTICE KAVANAUGH: So the specific --
2 to follow up again on Justice Alito's, the
3 specific reason that that's not a conflict but
4 this case is a conflict is?

5 MR. HUGHES: The specific reason is
6 because the federal government establishes a
7 uniform immigration policy with respect to who
8 they're going to prosecute and who not, and that
9 has immigration consequences.

10 But, beyond that, I think our field
11 preemption argument is an extraordinarily strong
12 one because all of the criteria that existed
13 with respect to Section 3 of SB 1070 are present
14 here. There is the exact same sort of
15 comprehensive and systematic system of
16 immigration, civil and criminal penalties.

17 And only the federal government can
18 exercise many of the forms of discretion that
19 are baked into those enforcement mechanisms. So
20 just to offer one example, it is a deportable
21 offense to use false information in order to
22 have fraud on the federal employment
23 verification system.

24 However, there's a discretionary
25 exception to that. If an individual enters the

1 United States as a lawful permanent resident and
2 then is working solely to support his or her own
3 immediate family, the federal immigration
4 authorities can waive deportation in those
5 circumstances.

6 Only the federal government can
7 balance that policy as an immigration matter.
8 When the states prosecute, the only remedy is
9 the state criminal offense and not the graduated
10 and varying mechanisms that the federal
11 government had available.

12 JUSTICE ALITO: If the -- if the
13 person whose identity is stolen has, let's say,
14 five dependents and the applicant for employment
15 has no dependents but puts down five dependents
16 so less money will be withheld under federal and
17 state law, could that applicant be prosecuted
18 for that offense?

19 MR. HUGHES: Your Honor, as I've said,
20 our theory is that yes, applicants can be
21 prosecuted -- sorry, the -- the -- the -- the
22 immigrant who has put down the information can
23 be prosecuted? Yes, Your Honor. I think that
24 an alien who uses false information can be
25 prosecuted for state tax offenses.

1 Now Kansas has made quite clear in
2 their brief, I think this is at page 10 of the
3 reply brief in a footnote, that they chose not
4 to pursue tax offenses in this particular case.
5 That was a decision that I think rested on
6 Kansas, as to whether or not they would pursue
7 this as a tax offense case, and they said quite
8 clearly they did not and declined to pursue a
9 prosecution in that fashion.

10 Now employment eligibility here --
11 much has been made from -- from the government
12 that employment eligibility is separate from
13 work authorization. That is not the
14 circumstance here because we know that Kansas
15 said so in its briefs below.

16 In the petition -- the appendix that
17 we --

18 JUSTICE KAVANAUGH: Why should we
19 worry about the briefs below? I -- I guess I'm
20 following up on Justice Gorsuch's question. We
21 have a serious issue that's going to affect how
22 -- how states go forward here, and particular
23 statements in the briefs below are -- should not
24 define that. They'll just use different
25 statements next time.

1 MR. HUGHES: Well, Your Honor, I think
2 the point is -- I -- I think there are two
3 points. First is what is the rule the Court
4 should adopt. And we have said our rule --

5 JUSTICE KAVANAUGH: Right.

6 MR. HUGHES: -- that we think the
7 Court should adopt is that a state offense is
8 preempted if an element of that is use of false
9 information to show federal employment
10 authorization under the immigration laws.

11 And the second question is the
12 applicability of that in the context of this
13 case. Of course, that is something the Court
14 could leave for remand if the Court agrees and
15 adopts our rule, which would be an appropriate
16 way to do it, but I think it's at least telling
17 that what the state has done in this case is
18 brought a prosecution that looks exactly like
19 the same prosecution if they were prosecuting
20 for fraud on the I-9 itself.

21 And so we know that from 1324a(b)(5)
22 that Congress in enacting IRCA in 1986 made the
23 determination that states may not prosecute
24 fraud on the I-9 itself.

25 I think it would not do much to that

1 statute if states can prosecute the exact same
2 theory, the exact same kind of immigration
3 offense, simply if they look at the K-4 or the
4 W-4 forms and -- and -- and disclaim reliance on
5 the I-9.

6 JUSTICE KAVANAUGH: I'm repeating
7 myself now, but you've said many times the state
8 could have a law prohibiting false statements on
9 the K-4.

10 MR. HUGHES: Yes, I think they could,
11 Your Honor, that's right, and that wouldn't be
12 an --

13 JUSTICE KAVANAUGH: And --

14 MR. HUGHES: -- immigration offense
15 and that would not be --

16 JUSTICE KAVANAUGH: -- and you've said
17 that's fine, even though that might be the same
18 kind of conduct that would be done on the I-9?

19 MR. HUGHES: Your Honor, I think if
20 somebody were challenging that law, it would be
21 an argument that's different than the sort of
22 argument that we're advancing for you here. I'm
23 not saying --

24 JUSTICE KAGAN: Well, they're not
25 challenging the law. They would be challenging

1 the application of the law and the use of the
2 law in a particular prosecution, much as you're
3 doing here.

4 And the question is, why would there
5 be a different result?

6 MR. HUGHES: Well, I don't think that
7 would be preempted, Your Honor, because it would
8 not be prosecuting an immigration offense. I
9 think an as-applied challenge would probably be
10 a challenge that would be based on selective
11 prosecution, if that were a theory that were
12 available given the facts. I can't say that it
13 would, but that would be the way that that law
14 would likely be challenged.

15 JUSTICE BREYER: So, in fact, the --
16 the -- here, the state is prosecuting this
17 person for using this false information which is
18 on the I-9, or wherever, in order to show that
19 he has federal authorization to work and,
20 thereby, is entitled to a job, which is the
21 property which he tried to get through
22 deception? Is that right?

23 MR. HUGHES: Yes, Your Honor.

24 JUSTICE BREYER: And in a different
25 case, they might not use the words in their

1 brief. They might not use the words he was
2 trying to get the job by showing he was
3 federally authorized.

4 But I suppose that those were the
5 facts. So they'd be rather pressed to use
6 different words unless the facts were different.
7 Is that not so?

8 MR. HUGHES: I -- I think that's --

9 JUSTICE BREYER: I mean, if they were
10 trying to get a job by using this to show that
11 they were in the hospital, then the defense
12 would say, or the prosecution would say, they --
13 they -- they showed they were in the hospital.

14 And if they tried to get it through
15 showing authorization, federal, the prosecution
16 would say that. Wouldn't they have to?

17 MR. HUGHES: I -- I think that's
18 right, Your Honor. And that just goes to say
19 that when, during the course of the prosecution,
20 the prosecutor is going to have to identify what
21 the theory of the fraud is.

22 JUSTICE BREYER: Yes.

23 MR. HUGHES: And they're going to have
24 to put that before the jury. And if the theory
25 of the fraud is you've used false information to

1 show compliance with federal work authorization
2 requirements, that is preempted.

3 And if that is not what the prosecutor
4 is arguing, if they have a different application
5 of the general statement of that clause --

6 JUSTICE BREYER: So is it up to the
7 defense lawyer in the -- in the court -- I mean,
8 I don't know if you could always say this, but
9 say to the -- to the jury: Jury, they've used
10 the word fraud to obtain a benefit, but they
11 have not explained to you how that fraud was
12 used to obtain a benefit. They do not have
13 witnesses who -- you see, et cetera.

14 What I'm driving at is this is not a
15 one-off case that will never occur again, but,
16 rather, it will occur in every instance where
17 the facts justify it.

18 MR. HUGHES: Well, that's right, Your
19 Honor.

20 JUSTICE BREYER: Am I right, or, no,
21 don't say I'm right if I'm wrong.

22 (Laughter.)

23 MR. HUGHES: No, you -- you're right,
24 Your Honor. And I think, as you -- you suggest,
25 this will come out in the context of something

1 like a motion for acquittal.

2 But I'll also say the rule that we
3 advance is in -- in -- in large measure a
4 prophylactic rule because prosecutors engage in
5 good faith. And if the Court identifies this
6 clear rule that we've advanced that
7 prosecutions, state prosecutions, can't turn on
8 the element of use of false information to show
9 federal work authorization, I think we can rely
10 on prosecutors won't bring those charges that
11 have that as a particular element.

12 And if there are charges that are
13 close to the line, then those are things that
14 trial courts will figure out in the course of
15 motions for acquittal or motions to dismiss or
16 motions in limine, and that will be sorted out
17 based on the actual evidence that was put before
18 in the particular case.

19 But I do think the prophylactic nature
20 of this rule is in keeping with exactly what the
21 structure Congress created in IRCA. I don't
22 think there's any other way to understand what
23 1324a(b)(5) does. Again, I believe Kansas is in
24 agreement that they can't prosecute fraud if the
25 fraud is on the I-9 itself.

1 And in every case there is going to be
2 a K-4 and a W-4, in every single case. And so,
3 if -- if Kansas is correct about federal
4 preemption in this context, 1324a(b)(5) did
5 effectively nothing --

6 JUSTICE SOTOMAYOR: So the state can't
7 --

8 MR. HUGHES: -- when Congress enacted
9 it.

10 JUSTICE SOTOMAYOR: -- according to
11 you, can't have a law that says you can't have a
12 job in this state unless you submit a K-4?

13 MR. HUGHES: Kansas -- sorry, a state
14 --

15 JUSTICE SOTOMAYOR: Kansas can't say,
16 have a law, that says you can't have a job in
17 this state without a K-4?

18 MR. HUGHES: I think Kansas probably
19 -- I don't think there's a federal preemption
20 problem with that. And, again, as we --

21 JUSTICE SOTOMAYOR: So why isn't that
22 this case? They're saying they couldn't get
23 this job unless they submitted the K-4?

24 MR. HUGHES: That -- that's not this
25 case because that is not the State of Kansas

1 law. Under Kansas law, it's actually to the
2 opposite. As we noted in Footnote 8 of our
3 brief, Kansas law does not require the
4 submission of a K-4 at the time of hiring.

5 As a matter of fact, it generally does
6 occur. But Kansas state law specifically
7 provides for individuals to be hired without
8 submitting a K-4. So there's simply not the
9 theory of -- of prosecution that was available
10 to Kansas in the facts of this case and not what
11 it was that they, in -- in fact, advanced.

12 So, ultimately, again, we think that
13 this is a narrow case, that use of false
14 information to show federal work authorization
15 is the element that is preempted.

16 It's a clear rule. It's a rule that
17 the trial courts across the states can regularly
18 implement. We think it's the only rule that
19 actually gives effect to what Congress did in
20 1324a(b)(5). Absent that rule, states would be
21 eligible to prosecute the exact same offense
22 that I think everybody agrees is expressly
23 preempted under -- under the -- the -- the text
24 of IRCA so long as it's given a different name.

25 And that's simply not how preemption

1 works. As this Court has said repeatedly,
2 preemption looks to what the state of the facts
3 regulating --

4 JUSTICE ALITO: Excuse me.

5 MR. HUGHES: -- not the label that the
6 state uses for the prosecution.

7 JUSTICE ALITO: How is it expressly
8 preempted under (b)(5)? That argument mystifies
9 me, because (b)(5) says nothing about work
10 authorization. It says nothing about aliens.
11 It says nothing about the use of the information
12 by a state government or by the federal
13 government. It applies to any use.

14 How you can read the argument that
15 you're making into (b)(5) is something that
16 escapes me. Can you explain that?

17 MR. HUGHES: So a -- a few things,
18 Your Honor. First, I think (b)(5) certainly
19 identifies the policy that Congress enacted
20 which informs our arguments under field
21 preemption. And I think that may in part be the
22 best way to look at this.

23 But, second, with respect to -- to
24 (b)(5) itself, I don't think there is much
25 dispute that it is a preemption provision,

1 because I think the -- the federal government
2 has agreed that it means you can't prosecute
3 fraud on the I-9 form itself.

4 The real question is, what is the
5 breadth of that express preemption provision?
6 And what Kansas has suggested is that it's
7 either all or nothing, that either it -- the --
8 the language and any information contained in
9 effectively does nothing because it reduces just
10 to what the form is or -- or a partial aspect of
11 the form, or, if you give any meaning to that
12 language, then there's no limitation and
13 everything is fair game.

14 That is not how the Court should
15 interpret this and that's not how the Court
16 interprets preemption statutes more broadly.
17 Take, for example, the *Maracich v. Spears* case
18 where the Court was assessing the language in
19 connection with this.

20 JUSTICE ALITO: No, but you want us to
21 say -- you say it's expressly preempted, even
22 though all of the elements, practically all of
23 the elements of the rule that you're advocating
24 are not mentioned at all in (b)(5). But you
25 want us to read all of those in and then say

1 this is an express -- this expressly preempts.

2 Now you may have a good argument under
3 some other category of preemption, but how it
4 can be expressed and how it can be express
5 preemption is really -- is really something.

6 MR. HUGHES: Well, this is information
7 that is contained in and they're using it for
8 the same purposes that underlie (b)(5), which is
9 showing --

10 JUSTICE GINSBURG: But did I --

11 MR. HUGHES: -- federal employment
12 authorization.

13 JUSTICE GINSBURG: -- understand you
14 to say that you thought your better theory was
15 field preemption, not express preemption?

16 MR. HUGHES: I -- I think they're both
17 good theories, Your Honor, but, yes, I think the
18 (b)(5) points up to field preemption and I think
19 field preemption is a very strong theory for us
20 because this -- we have direct congressional
21 direction that establishes the -- the balance
22 between the states and the federal government.
23 And in (b)(5), whether one thinks that that is
24 express preemption or not, I think it -- it
25 undeniably identifies the policy judgment of

1 Congress that the federal government alone
2 should have the authority to prosecute these
3 immigration offenses.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Three minutes, General Schmidt.

8 REBUTTAL ARGUMENT OF GEN. DEREK
9 SCHMIDT ON BEHALF OF THE PETITIONER

10 GENERAL SCHMIDT: Thank you, Mr. Chief
11 Justice.

12 I'd like to try to make three points.

13 With respect to Justice Alito's line of
14 questioning on the (b)(5) language, (b)(5) is
15 certainly, if read as a preemption provision,
16 most unusual, at -- not least of which is
17 because it is not aimed exclusively at states.
18 Preemption is a supremacy clause concept that
19 regulates the relationship between the federal
20 government and states.

21 But (b)(5) speaks not only to that but
22 also to the relationship between the law
23 Congress passed and what the federal government
24 may do, and, most importantly, as I was
25 discussing earlier with Justice Kagan, what

1 private employers may do with this information
2 that they were compelled to collect and maintain
3 in a novel manner back in 1986.

4 And we think that explains your
5 earlier question, Justice Alito, with respect to
6 what does "information contained in" mean. We
7 think it is an effort by Congress to make
8 absolutely clear, not just to states and not
9 just to the federal government, but to millions
10 of private employers who now must by command of
11 federal law maintain this private information,
12 that they may not use the form or information
13 harvested from the form or information attached
14 and submitted for the purpose of satisfying the
15 requirements of the form. We don't think
16 express preemption gets them there.

17 Second, with respect to the benefit
18 question, which I think goes perhaps to -- I'm
19 not sure if it goes to conflict or -- or field,
20 I'm a little uncertain about that -- but on the
21 benefit issue, I -- I -- I -- the -- the -- what
22 we agree is off limits is the I-9 system.

23 We aren't arguing that Kansas
24 prosecuted these individuals because they were
25 trying to commit fraud on the I-9 system. We're

1 arguing that they defrauded folks whose
2 identities were stolen and that we used as
3 evidence the W-4 and K-4 tax forms. We didn't
4 use the I-9 system.

5 With respect to the notion that
6 somehow preemption turns not on the intent of
7 Congress but on the subjective intent of the
8 offender, that turns preemption analysis on its
9 head.

10 And a hypothetical I think that
11 illustrates that, imagine that let's say Mr.
12 Garcia on the facts here were stopped for
13 speeding not because he was headed to a job he
14 already had but because he was headed with
15 completed employment forms, applications in the
16 back of his car, to apply for the job.

17 He still would be guilty of the same
18 state law crimes of identity theft. His intent
19 was to obtain the benefit of employment. But he
20 never arrived at the employer to apply for the
21 job in the first place. That can't be the test
22 that makes the difference here.

23 And, finally, with respect to the --
24 the notion of what the state is asking for here,
25 we're -- we're a little unclear on exactly what

1 field our friends on the other side think is
2 preempted.

3 As I suggested earlier, if there is
4 one, it has to be extremely narrow, the I-9
5 system itself, but we're not sure a field exists
6 there because of the decision in Whiting that
7 states may compel the use of the E-Verify
8 system, which certainly is part of work
9 authorization.

10 So this Court has never identified a
11 field and should not with respect to this case.
12 The conflict, we don't see. The conflict that
13 was present in Arizona, as we discussed earlier,
14 is not present here. This is a fundamentally
15 different case.

16 Kansas is not trying to act as an
17 immigration enforcer but to enforce our
18 generally applicable identity theft laws.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:06 a.m., the case
23 was submitted.)

24

25

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